United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig. with affidavit of mailing

74-1260

To be argued by
CONSTANCE M. VECELLIO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1260

WILLIAM S. PARISI, as father and natural guardian of VALERIE M. PARISI, an infant,

Plaintiff-Appellant,

—against—

CASPAR WEINBERGER, Secretary of Health, Education & Welfare,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal by plaintiff, William S. Parisi, from an order of the United States District Court for the Eastern District of New York (Travia, *J.*), entered January 7, 1974, in an action brought under Section 205(g) of the Social Security Act, as amended (hereinafter "the Act"), to review a final decision of the Secretary of Health, Education, and Welfare (hereinafter "the Secretary") which denied plaintiff's application for reentitlement to child's insurance benefits under Section 202(d) of the Act, 42 U.S.C. § 402(d). The District Court's order granted the defendant's motion for summary judgment, dismissing the plaintiff's complaint, and denied plaintiff's motion for summary judgment.

Statement of the Case

Claimant, Valerie Parisi, was born on June 23, 1952 (Tr. 52). Aida A. Parisi, mother of the claimant, died on March 5, 1967, fully insured under the applicable provisions of the Social Security Act. Valerie Parisi was found entitled to and did receive child's insurance benefits under Section 202(d) of the Act on her deceased mother's earnings record for the month commencing March, 1967 (Tr. 35). The benefits were terminated by reason of her marriage to Charles G. Baldwin on September 12, 1970. This marriage ended in divorce, and claimant applied for reentitlement to child's insurance benefits in November, 1971 (Tr. 42-45), based upon her divorce which became final on November 5, 1971 (Tr. 51), and upon the fact that she was at that time a full-time student under twenty-two years of age (Tr. 10). This application for reentitlement was denied on March 16, 1972 (Tr. 47). A request for reconsideration (Tr. 48) led on June 19, 1972, to a reaffirmation of the initial determination disallowing the claim (Tr. 49-50). Plaintiff requested a hearing (Tr. 14) which was held on November 8, 1972 (Tr. 15-30). Plaintiff's father, an attorney, appeared at the hearing. The Administrative Law Judge considered the case *de novo* and on December 1, 1972 found that plaintiff's marriage terminated her entitlement to child's insurance benefits and that she did not thereafter become reentitled because of her divorce (Tr. 5-11). The decision of the Administrative Law Judge became the final decision of the Secretary when it was approved by the Appeals Council on February 28, 1973 (Tr. 2).

ARGUMENT

Section 202(d) of the Social Security Act requires the termination of child's insurance benefits upon the marriage of the recipient and does not permit the reinstatement of these benefits following a divorce.

Section 202(d) of the Social Security Act, 42 U.S.C. § 402(d)(1), provides, in pertinent part, as follows:

> (d)(1). Every child (as defined in Section 416 (e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age or 22, or (ii) is under a disability . . .
>
> (C) was dependent upon such individual—(i) if such individual is living, at the time such application was filed, (ii) if such individual has died, at the time of such death, or (iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits, shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and *ending with the month preceding whichever of the following first occurs*—

> (D) *the month in which such child dies, or marries,*
>
> (E) the month in which such child attains the age of 18, but only if he (i) is not under a disability . . . at the time he attains such age, and (ii) is not a full-time student during any part of such month (Emphasis added).

Thus, this section of the Act, which outlines the parameters of entitlement to child's insurance benefits, clearly states in paragraph (1)(D) thereof that such benefits must end in the month preceding the month in which the child marries.

Section 202(d)(6) of the Act, 42 U.S.C. § 402(d)(6), provides that, in certain specific circumstances, a child whose benefits have terminated may become reentitled to benefits. Section 202(d)(6) reads, in pertinent part, as follows:

> (6) A child whose entitlement to child's insurance benefits on the basis of the wages and self-employment income of an insured individual terminated with the month preceding the month in which such child attained the age of 18, or with a subsequent month, may again become entitled to such benefits (*provided no event specified in paragraph (1)(D) has occurred*) beginning with the first month thereafter in which he
>
> (A)(i) is a full-time student or is under a disability (as defined in section 223(d)), and (ii) has not attained the age of 22, or
>
> (B) is under a disability (as so defined) which began before the close of the 84th month following the month in which his most recent entitlement to child's insurance benefits terminated because he ceased to be under such disability, but only if he has filed application for such reentitlement. Such reentitlement shall

> end with the month preceding whichever of the following first occurs:
>
> (C) the first month in which an event specified in paragraph (1)(D) occurs (Emphasis added).

The words of subsection (6) of Section 202(d) of the Act clearly provide that a child whose benefits have been terminated may become reentitled to such benefits "provided no event specified in paragraph (1)(D) has occurred"—*i.e.*, death or marriage. Congress has thus established a clear policy against the payment of child's insurance benefits to one who has married. The words used by Congress are mandatory; exercise of discretion is not possible, and nothing in the Act suggests that divorce before the date of reapplication for benefits can affect the entitlement thereto. Had Congress intended that a child become reentitled to benefits following a divorce, it could easily have so provided. It has not been suggested that Congress is unaware of the possibility of divorce. Yet no provision was added to cover such situations. As Judge Weinfeld stated in *Herzberg* v. *Finch*, 321 F. Supp. 1367, 1369 (S.D.N.Y. 1971), ". . . the court does not have the power to amend the legislative act in order to rectify the alleged Congressional 'oversight'. To do so requires the court to legislate and not to interpret a statute which is clear and unambiguous."

The Secretary has, of course, so interpreted the Act. See Social Security Ruling 67-33, CCH Unemployment Insurance Reporter Transfer Binder, Paragraph 14,819 (Nov. 1966-Nov. 1968).* The Secretary has also promulgated regulations to the same effect as the provisions of the Act. See 20 CFR 404.320 and 404.321.

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* The Administrative Law Judge quoted the following portion of that opinion in his decision: "Because C married in 1963, after he had been entitled to benefits on R's earnings record, Section 202(d)(7) specifically precludes his reentitlement to child's insurance benefits on that earning record, even though his marriage terminated in divorce and he was unmarried at the time he applied for reentitlement in August 1965" (Tr. 10).

Furthermore, the policy against the payment of child's benefits to one who has married is consistent with the purpose of such benefits. Section 202(d)(1)(C) of the Act, 42 U.S.C. § 402(d)(1)(C), provides that, in order to be entitled to child's insurance benefits, the child must have been *dependent* upon the wage-earner upon whose record he claims to be due such benefits. By marrying, a child abandons the dependent status which initially entitled him to benefits.

The object of Section 202(d) of the Act is to provide the surviving child with benefits *only* where he has suffered a loss of support through the death of a parent on whose earnings record the benefit is claimed. See *Leeson* v. *Celebrezze,* 225 F. Supp. 527, 528 (E.D.N.Y. 1963). Since it is only when the child was dependent on the wage earner that financial hardship arises upon the death of the parent, Congress did not provide benefits for children who would have supported themselves independently of the parent, had the parent survived. The drafters of the Social Security Act were well aware that an infant who marries normally becomes financially independent of his parents. This judgment that a married infant suffers no loss of support from the deceased parent is reasonable and justifies the exclusion from statutory benefits.

This policy established by Congress reflects ar understanding of long existing legal relationships between parent and child. At common law, parents have a responsibility to support and maintain their minor children. *Fuller* v. *Galeota,* 271 App. Div. 155, 63 N.Y.S. 2d 849 (4th Dept. 1946). However, when the infant assumes a status inconsistent with the subjection to control by his parent, "emancipation" is said to occur. *Murphy* v. *Murphy,* 206 Misc. 228, 133 N.Y.S. 2d 796 (Sup. Ct. 1954). Marriage of a child is one such event which emancipates the infant, and, in absence of agreement, terminates the obligation of the parent for support even during minority. *Kinsey* v. *Kinsey,*

200 Misc. 760, 107 N.Y.S. 2d 212 (Dom. Rel. Ct. 1951); *Murphy* v. *Murphy, supra.* Congress' decision to terminate a child's insurance benefits once he marries is a rational extension of this common law doctrine that a parent need not support a married infant.

The very provisions of subsection 6 of Section 202(d) of the Act indicate that Congress did not intend the result which plaintiff requests. That subsection provides that children whose benefits were terminated *in the month preceding the month of their eighteenth birthday, or in a subsequent month,* may, under certain circumstances be re-entitled to those benefits. But subsection (1)(D) of section 202 provides that child's insurance benefits must be terminated in the month preceding the month in which the child marries, regardless of the age of the child at the time of the marriage. Thus, for example, a child who had married at age sixteen would have had his benefits terminated in the month preceding his marriage. Under the interpretation which plaintiff asks this court to adopt of subsection (6), a child whose benefits had ceased because he married at the age of eighteen could become re-entitled to those benefits upon the happening of his divorce, whereas a child whose benefits ceased because he married at the age of sixteen could not become so re-entitled. It would indeed be irrational if Congress had provided that children whose benefits ceased because they married at the age of 18 or older could become re-entitled to those benefits, but children whose benefits had ceased because of a marriage at an earlier age could not become so re-entitled.

The goal of Section 202(d) of the Act is to provide the child of a wage earner a minimal level of support as a substitute for the support given to the dependent child by the deceased parent while he lived. The exclusion of children who have married from these benefits is rationally related to the achievement of this goal because children who have married are not traditionally recipients of parental support.

The Social Security Act "was designed to alleviate economic distress among those who depended on the wage earner for their support." *Collins* v. *Celebrezze*, 250 F. Supp. 37 (S.D.N.Y. 1966). However, Congress, of course, has the duty of defining those who come within this category; while Congress has defined a child who is under 18 (or under 22, if he is a full-time student) as one who depended on the wage-earner for support, Congress has also decreed that when such a child marries, the dependent status has ended.

CONCLUSION

The holding of the District Court that the Secretary's determination is a correct interpretation of applicable law should be affirmed.

Respectfully submitted,

April 24, 1974

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 24th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a x two copies of brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Stanley F. Meltzer, Esq.
Meltzer and Fishman, Esqs.
225 Broadway
New York, NY 10007

Sworn to before me this
24th day of April 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19...75

Deborah J. Amundsen

Deborah J. Amundsen